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Attorney for the Plaintiff
HERMAN MENEZES, LLC

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * *

IN RE:

ALVIN A. BRESCIANI, an individual

Debtor.

HERMAN MENEZES, LLC, a Nevada
Limited Liability Company,

Plaintiff,

Vs.

ALVIN BRESCIANI, an individual,

Defendant.

Case No. 3:22-bk-50266-hlb

Adv. Case No: 22-05012-hlb

Chapter 7

Hearing Date: 11/9/2023

Hearing Time: 10:00 a.m.

**POINTS AND AUTHORITIES
IN REPLY TO OPPOSITION
TO MOTION FOR
SUMMARY JUDGMENT**

TO THE COURT AND ALL PARTIES IN INTEREST:

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COMES NOW, HERMAN MENEZES, LLC, by and through the undersigned counsel, and hereby files the following Reply to the September 26, 2023 Opposition to Motion for Summary Judgment filed by Defendant ALVIN BRESCIANI.

This Reply is made and based upon all the pleadings and records on file for this proceeding together with every exhibit that is mentioned herein or attached hereto (each of which is incorporated by this reference as though it were set forth herein *haec verba*), if any there be, as well as the points and authorities set forth directly hereinafter.

MEMORANDUM OF POINTS AND AUTHORITIES

a. Bresciani Failed to Present any Evidence Creating a Genuine Issue of Fact

Under FRCP 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

If the moving party satisfies its initial burden, the burden of production then shifts to the opposing party, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue requires evidence, not speculation or guesswork. *Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001). The opposing party may not simply rely upon the allegations or denials in its pleadings. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 n.3, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Nor can it rely on testimony that is conclusory, speculative, or "uncorroborated and self-serving" to raise genuine issues of fact and defeat summary judgment. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (citations and internal

1 quotations omitted); *Thornhill Pub. Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.
2 1979). The opposing party, by citing to documents, depositions, declarations,
3 admissions, interrogatory answers, or other material, must identify specific
4 material facts that are genuinely in dispute that are the basis of its challenged
5 claim. See Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co.*, 475 U.S. at 586 n.11
6 (citation omitted).

7 In Plaintiff's Motion, the following evidence was presented to support the
8 Motion: Exhibit 1: The contract dated December 19, 2019, between the Plaintiff
9 (Menezes) and Bresciani, which pertains to the agreement for the production and
10 delivery of approximately 3,840 tons of Organic Alfalfa Hay. This contract serves
11 as evidence of the business agreement and terms between the two parties;
12 Exhibit 2: Documentation that shows the balance left on the agreement due to
13 Bresciani's failure to deliver the agreed amount of hay. The document provides a
14 breakdown of the hay delivered, the deposit made by Menezes, and the balance
15 due; Exhibit 3: A notice from Bank of America informing the Plaintiff that
16 Bresciani's check for \$67,160 had been returned due to insufficient funds. This
17 serves as evidence of Bresciani's failure to make the promised payment; Exhibit
18 4: A letter sent by the Plaintiff to Bresciani via certified mail, notifying Bresciani
19 about the returned check and its insufficient funds; Exhibit 5: Documentation
20 highlighting the additional hay, valued at approximately \$50,793, that Bresciani
21 removed from Taylor Farms without payment. This provides evidence of another
22 instance of Bresciani's fraudulent behavior; Exhibit 6: A copy of the Complaint
23 filed against Mr. Bresciani and Bresciani Hay Company, Inc. on January 4, 2021,
24 detailing the various claims, including fraud, breach of the implied covenant of
25 good faith and fair dealing, a claim for passing a bad check, conversion, and
26 exemplary damages; Exhibit 7: A copy of the December 23, 2021, Order from the
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1 Nevada District Court, which struck Bresciani's answer and rendered a default
2 judgment in favor of the plaintiffs; Exhibit 8: The Motion for Damages filed in
3 January 2022. Included in this exhibit, on page 8, is the sworn declaration of
4 Mark Menezes, Manager of Herman Menezes, LLC, who authenticated the
5 relevant documents supporting the damage claim. His declaration attests to the
6 facts alleged against Bresciani and the incurred damages; and Exhibit 9: The
7 order from the Nevada District Court dated January 28, 2022, which awarded
8 Menezes \$330,570.65 in damages plus interest.

9 Menezes provided a combination of contractual documents, bank notices,
10 legal filings, and a sworn declaration by Mark Menezes to substantiate the claims
11 against Bresciani. Bresciani did not challenge the authenticity or admissibility of
12 any of the evidence presented by Menezes. Bresciani provided no evidence, just
13 documents from the underlying case contesting the facts related to the Nevada
14 State Court issuance of default judgment, which are not relevant to the question
15 before the court.
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17 Bresciani has the burden to go beyond the pleadings and present concrete
18 evidence from which a reasonable jury could return a verdict in their favor.
19 Bresciani's opposition does not rise to this standard. While Bresciani's counsel
20 asserts various claims and defenses in his opposition, he fails to offer concrete
21 evidence to support these factual assertions. Conclusory statements,
22 unsupported by material facts, are insufficient to stave off summary judgment.
23 Simply put, more than uncorroborated and self-serving testimony is required to
24 find a genuine issue for trial. Speculation, conjecture, and suppositions, which
25 are all that are provided, do not meet the requirements to defeat a well-founded
26 motion for summary judgment.
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1 Moreover, Bresciani does not provide citations to specific parts of
2 evidence, depositions, documents, or other materials that would substantiate his
3 claims. The motion consists entirely of unsworn statements of Bresciani's
4 counsel. Arguments of an attorney are not evidence. See *Nev. Ass'n Servs., Inc.*
5 *v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014). The
6 absence of factual support places his assertions in the realm of mere
7 speculation. It is imperative for the opposing party to cite to specific evidence in
8 the record that would suggest a genuine dispute over a material fact. This is a
9 procedural requirement that Bresciani has overlooked, to his detriment.

10 Furthermore, the facts provided by Bresciani are speculative and lack
11 documentary corroboration. The Court is not required, nor is it in a position, to
12 rely on such speculative testimony. Without tangible evidence that contradicts
13 the moving party's claims, FRCP 56 requires the Court to accept the undisputed
14 facts as presented by the moving party.

15 The undisputed evidence shows that From July 14, 2020, to August 18,
16 2020, Bresciani misappropriated approximately 404 tons of hay that belonged to
17 Menezes and instead supplied it to his other customers. This hay had never been
18 delivered to Menezes, and its misdirection amounted to a fraudulent act. On
19 August 5, 2020, Bresciani issued a check for \$67,160 to Menezes. However, this
20 check was returned due to insufficient funds. Menezes was informed of this by
21 Bank of America, and despite sending a notice via certified mail to Bresciani
22 regarding this bounced check, Bresciani did not rectify the situation or even
23 respond. Bresciani further removed hay worth approximately \$50,793 from Taylor
24 Farms, which was again fraudulent since he had not paid for it. This action led
25 Menezes to incur further damages.
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1 In sum, Bresciani has failed to meet his burden of demonstrating that there
2 is a genuine dispute as to any material fact. The evidence, or lack thereof,
3 presented in his opposition does not create any genuine issue for trial. Therefore,
4 considering the standard in FRCP 56, the court should grant the motion for
5 summary judgment, as no reasonable jury, based on the evidence presented by
6 Bresciani, could find in his favor.

7 **b. Bresciani's discussion of collateral estoppel is misplaced.**

8 Bresciani argues that under the federal issue preclusion doctrine, Bresciani
9 would have an opportunity to contest the charge of fraud in the context of
10 non-dischargeability because the issue was never actually litigated in state court,
11 citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980), citing *Montana v. United States*,
12 440 U.S. 147, 153 (1979); *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir.
13 1987).
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15 The Motion by the Plaintiff seeks summary judgment based on the facts of
16 the case under 11 U.S.C. 523(a)(2)(A) - issue preclusion is not raised. Because
17 Plaintiff has never requested the court grant the underlying state court judgment
18 preclusive effect, Defendant's discussion of issue preclusion standards is entirely
19 irrelevant to Plaintiff's Motion.

20 Bresciani's discussion of the facts and circumstances surrounding his
21 failure to litigate the underlying case is not relevant, as Bresciani failed to contest
22 the facts. There is no genuine dispute that Bresciani failed to respond
23 adequately to court orders related to discovery. As a result, his answer was
24 struck, and a default judgment was rendered in favor of the Plaintiffs in
25 December 2023. When a Motion for Damages was made in January 2022,
26 Bresciani did not respond, leading the Nevada District Court to issue an order
27 awarding Menezes \$330,570.65 in damages plus interest.
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1 WHEREFORE, PLAINTIFF HEREBY MOVES: in accordance with Fed. R.
2 Civ. P. 56; Fed. R. Bankr. P. 7056. for summary judgment against the Defendant
3 and an order declaring that the \$330,570.65 in damages plus prejudgment and
4 post-judgment interest in the amount of 6.75% owed to HERMAN MENEZES,
5 LLC is non-dischargeable under the provisions of 11 U.S.C. § 523.
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8 **DATED** this Oct 9, 2023

9 By: /s/ Luke Busby, Esq.
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CERTIFICATE OF SERVICE

I certify that on the date shown below, I caused service to be completed of a true and correct copy of the foregoing **REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** by:

_____ personally delivering;

_____ delivery via Reno/Carson Messenger Service;

_____ sending via Federal Express (or other overnight delivery service);

_____ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto;
or,

 x delivery via electronic means (fax, eflex, NEF, etc.) to:

Law Office of Cliff Young
Cliff Young
650 S. Rock Blvd., Ste. 21A
Reno, NV 89502
Counsel for Alvin Bresciani

By: /s/ Luke Busby, Esq.
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Oct 9, 2023